



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No 33753

SOUTH PLAINS SWITCHING, LTD CO
- ACQUISITION EXEMPTION -
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S
RESPONSE TO REQUEST FOR EASEMENT
AND TRACKAGE RIGHTS
BY SOUTH PLAINS SWITCHING, LTD. CO.**

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BNSF Railway Company (“BNSF”)¹ hereby responds to the request made by South Plains Switching, Ltd. Co. (“SAW”) in its August 3, 2007 Reply in Opposition to BNSF’s Petition for Clarification in this proceeding that the Surface Transportation Board (“Board” or “STB”) find that SAW “has an easement by necessity and corresponding trackage rights over BNSF’s mainline to provide reasonable access from SAW Track 9298 to Tracks 310, 320, 330 and 340.” SAW Reply at 10. Under established Board precedent,² BNSF is entitled to respond to SAW’s request for Board action, and, as shown below, SAW is not entitled to the

¹ The Burlington Northern and Santa Fe Railway Company changed its name to BNSF Railway Company effective January 20, 2005.

² See, e.g., *Union Pacific et al. and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation et al.*, F.D. No. 32760 (Decision No. 5) (served Sept. 18, 1995), where the Board’s predecessor recognized that replies to affirmative requests for relief made in a reply to a pleading are proper notwithstanding the general prohibition in 49 C.F.R. 1104.13(c) against replies to a reply. In addition, the ICC accepted the challenged response to ensure that it had the substance of the parties’ positions before it.

relief it requests.³ Even apart from the fact that the Board lacks the authority to grant SAW that relief, the premise of SAW's claim to an easement – *i.e.*, that it cannot serve its shippers without using the disputed segment of BNSF's mainline at Lubbock, Texas – is without factual foundation.

BACKGROUND

In light of SAW's contention that the Board should impose an easement in its favor and grant it the trackage rights described above, a fuller and more complete exposition of the relevant facts is required. The triggering event in the current dispute occurred on June 22, 2007, when SAW asked for permission from BNSF's dispatcher to occupy BNSF's mainline at Lubbock. Given that the 1999 Asset Sale Agreement ("Agreement") between the parties provides that SAW can use BNSF's mainline solely for the purpose of interchanging cars between SAW's yard and BNSF's Lower Yard at Lubbock, BNSF understood that SAW sought to use the mainline for that purpose. BNSF discovered, however, that SAW used the mainline that day to switch cars on SAW Track 380.⁴ BNSF's trainmaster at Lubbock advised SAW that such use was not authorized and instructed SAW not to make the switching movement again. Four days later, SAW filed suit in Texas state court and secured a temporary restraining order on June 26, 2007, permitting it to continue to use the BNSF mainline to switch its tracks. The TRO expired

³ In its Reply, SAW argues that BNSF's Petition for Clarification should be dismissed on the ground that BNSF seeks an interpretation of the nature and extent of trackage rights conveyed to SAW by BNSF in the parties' 1999 Asset Sale Agreement. SAW Reply at 2. BNSF does not, however, seek such Board action here. Rather, as explicitly stated in the Petition, BNSF seeks a clarification of the trackage rights authority SAW received in this proceeding pursuant to the Amended Verified Notice of Exemption filed on July 1, 1999 ("Exemption Notice"). The scope of the authority granted pursuant to the Exemption Notice is within the Board's purview.

⁴ As shown on Attachment SW-1 to the Verified Statement of Shad Wisener submitted with SAW's Reply, Track 380 is connected to Track 340.

on July 10, 2007, and on July 24, 2007, the state court granted BNSF's Plea to the Jurisdiction and held that the STB had exclusive jurisdiction over and should decide the scope of the Exemption Notice.

As explained in BNSF's Petition, SAW took the position in the proceedings before the state court that the Board authorized SAW trackage rights between Mile Posts 676.6 and 679.3 on BNSF's mainline in the Exemption Notice. SAW did not assert that the Agreement itself granted SAW those trackage rights. Indeed, SAW could not have taken that position since the Agreement clearly and explicitly limits SAW's trackage rights to the segment of the BNSF mainline between Track 9298 and BNSF's Lower Yard at Lubbock for the sole purpose of interchanging traffic between the two carriers' yards at Lubbock.⁵ See Agreement § 1(d).

SAW made no mention in the state court proceedings of the easement by necessity which it now claims the Board should enter in its favor. Moreover, SAW conceded in the state court, as it had to do, that there are alternative routes available to it over its own tracks that permit it to reach the customers it seeks to serve via the BNSF mainline. SAW contended, however, that the BNSF mainline was faster and more efficient than its lines and also that its lines were sometimes blocked by large rock trains coming into the Lubbock area.

⁵ In this regard, SAW has asserted that both the Agreement and Exemption Notice refer to approximately three miles of SAW incidental trackage rights and that, since the distance between Track 9298 and BNSF's Lower Yard is substantially less than three miles, the parties intended that SAW would have the additional mainline trackage rights it seeks. SAW is, however, wrong in that the Agreement makes no mention at all of the length of the trackage rights SAW received. The Exemption Notice does indicate that SAW was to receive approximately three miles of trackage rights. However, as explained in BNSF's Petition for Clarification, the Exemption Notice clearly states that the only mainline trackage rights being requested (and thus authorized) were between Track 9298 and the Lower Yard, and the fact that SAW included an estimate of the total length of the trackage rights cannot alter the specific description of those rights set out clearly elsewhere in the Exemption Notice.

ARGUMENT

Initially, Board precedent establishes that the issue of whether SAW is entitled to an easement by necessity should be resolved in state court. *See Mid-America Locomotive and Car Repair, Inc. – Petition for Declaratory Order*, F.D. No. 34599 (served June 6, 2005), where Mid-America's petition for a declaratory order from the Board that it had a right under state property law to an easement by necessity over railroad-owned property was denied by the Director of the Office of Proceedings on the ground that the state court should resolve the parties' dispute under applicable state or local property law.⁶ *See also Kansas City Pub. Serv. Frgt. Operation – Exempt – Aban*, 7 I.C.C. 2d 216, 225-26 (1990) (issues of real property rights are within exclusive jurisdiction of the State). Further, the Board has no jurisdiction to grant trackage rights authority in these circumstances not requested by the applicant (SAW) nor agreed to by the parties.

SAW seeks to counter these two bedrock principles by arguing that BNSF's position that SAW's trackage rights are limited to BNSF's mainline between Track 9298 and the Lower Yard for the sole purpose of interchange "is not reconcilable with actual operations nor consistent with the Agreement and Notice Exemption as a whole." SAW Reply at 5. While SAW then proceeds to try to support its argument by citing the parties' alleged course of performance, SAW's entire argument is irrelevant since SAW is effectively seeking to have the Board do what it said the Board had no jurisdiction to do – interpret the Agreement and resolve the parties' dispute as to its meaning. Issues relating to whether the parties' operating practices and how BNSF served

⁶ The Director further held that, if the state court were to determine that Mid-America was entitled to an easement by necessity, then the issue of whether the use of the easement would be preempted under 49 U.S.C. 10501(b) on the grounds that it would unreasonably interfere with railroad operations would need to be addressed.

particular shippers before the sale reflect an intent under the Agreement that SAW should have the right to use the BNSF mainline to serve shippers located on its tracks are issues to be resolved by the state court. The only issue here is what authority was conveyed via the Exception Notice.

Finally, as noted, SAW has conceded that it can access its tracks by means other than BNSF's mainline. For instance, SAW admits that PYCO Plant 2, located on Track 320, can be reached via Track 310⁷ or Track 231. SAW Reply at 7. Similarly, SAW also admits that it can serve Farmers Compress Plants 4 and 5, located on Track 330, via Track 310 or Tracks 231 and 9298. *Id.* at 8. Likewise, SAW admits that it can serve ADM, located on Track 340, via several of its own tracks. *Id.* Thus, it is not "necessary" for SAW to have the rights to use BNSF's mainline, and the factual basis for an easement by necessity is absent.

The fact that the tracks which SAW can use to serve these shippers may on occasion be blocked by other traffic, may require the use of additional locomotives, or may be circuitous is irrelevant and does not justify the awarding of an easement or additional trackage rights even if the Board had the authority to do so—which it does not. SAW has multiple routes on its own tracks available to serve its shippers, and it should not be able to force BNSF to allow it to use BNSF's critical mainline trackage rather than the trackage it bought in 1999 to serve those shippers, even if that trackage may be circuitous or not as efficient or well maintained as BNSF's trackage.

⁷ SAW can access Track 310 from the segment of BNSF's mainline that SAW uses to reach BNSF's Lower Yard. Since the switch to Track 310 connects to that segment, BNSF has not objected to SAW's use of the mainline for such purpose.

CONCLUSION

For the reasons set forth above and in BNSF's Petition for Clarification, the Board should clarify that the trackage rights authorized pursuant to the Exemption Notice were limited to BNSF's mainline between Track 9298 and BNSF's Lower Yard at Lubbock. Regardless of whether SAW believes the Agreement should be interpreted to grant it the further trackage rights it now seeks (a matter within the jurisdiction of the state court), SAW only asked in the Exemption Notice for trackage rights authority between Track 9298 and the Lower Yard, and the authority granted by the Board can reach no farther. In addition, the Board has no jurisdiction to award SAW an easement or trackage rights even if there were a factual basis – which, as shown, there is not – for such relief.

Respectfully submitted,



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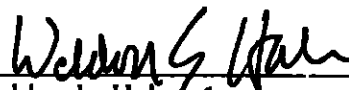
Attorneys for BNSF Railway Company

Dated: August 21, 2007

VERIFICATION

I, Weldon E. Hale, Director of Short Line Development for BNSF Railway Company
verify under penalty of perjury under the laws of the United States that the facts set forth in the
foregoing Response to Request for Easement and Trackage Rights are true and correct. Further,
I certify that I am qualified and authorized to file this Verification

Executed on August 14, 2007



Weldon L. Hale

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August 2007, a true and correct copy of the foregoing BNSF Railway Company's Response to Request for Easement by South Plains Switching, Ltd. Co. was served by overnight delivery on the following:

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